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Supreme Court, U.S.
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No. 02-1028

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LTD D/B/A/ KIRBY ENGINEERING, MMI GENERAL INSURANCE, LTD.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

Respondents' brief is long on indignant rhetoric, but remarkably short on authority. They fail to cite a single case holding that an ocean carrier's bill of lading is unenforceable against the cargo owner because the bill was issued to a freight forwarder that itself had liability to the cargo owner as a carrier. This is scarcely odd because the authorities are universally to the contrary. Respondents' entire argument is founded on the flawed premise that the Hamburg Süd bill of lading is simply a carrier-to-carrier subcontract between ICC and Hamburg Süd. To the contrary, the longstanding federal rule (established by this Court under the common law and the Interstate Commerce Act, and adopted by the Shipping Act that governs this transaction) is that a forwarder-carrier like ICC is a shipper (not an initial carrier) in contracting with transportation carriers, and those contracts are binding on the cargo owner that entrusted its goods to the forwarder-carrier for shipment. Pet. Br. 22-36. Respondents fare no better with their arguments regarding the ICC Himalaya clause. Their attempt to convert *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959), into a rule of contract reformation cannot be squared with this Court's cases.

1. Much of respondents' brief is an exercise in distraction. Respondents begin with the far-fetched claim that Norfolk Southern ("NS") has radically shifted position between its petition and merits brief, such that its argument turns on whether Hamburg Süd owned the ship that carried Kirby's goods. Resp. Br. 1-2, 14-15. Respondents use this supposed "change of course" as an excuse to go beyond the record and introduce new evidence that Hamburg Süd "apparently" transported the goods "under a 'slot charter.'" *Id.* at 3, 15.

Respondents' argument is contrived. NS has in no way changed its position; there is no substantive distinction between the phrasing "provide that transportation" (Pet. i) and "actually transport the owner's goods" (Pet. Br. i). The

rewording only underscores the difference between vessel carriers and forwarder-carriers, and that the owner is the true party-in-interest because *its* goods are being transported. Even if *arguendo* there were an inadvertent substantive difference, the petition's question presented controls, Sup. Ct. R. 24.1(a), and NS's arguments in the petition and the merits brief are exactly the same. Compare Pet. 14-23 with Pet. Br. 22-39. Moreover, respondents' assertion that they could not have raised this issue until now is disingenuous. The petition repeatedly referred to Hamburg Süd as the vessel carrier that actually transported the goods, Pet. 2, 6, 8, 13, 14; if these were relevant misstatements, which they are not, respondents were obliged to object to them in their opposition or else the objection is waived. Sup. Ct. R. 15.2. Instead, respondents affirmatively represented to this Court that "Hamburg Süd *carried the cargo itself* on the ocean voyage from Sydney to Savannah, Georgia." Opp. 5 (emphasis added).

Whether Hamburg Süd carried the goods on its own ship or by slot charter is irrelevant to the question presented.[1] In either event, Hamburg Süd is a carrier under COGSA and an "ocean common carrier" under the Shipping Act.[2] Nothing in the Hamburg Süd bill turns on that fact. The bill fixes the rights and duties of the "carrier," broadly defined as "Columbus Lines, which is the trade name used by [Hamburg Süd], the Carrier named on the face side thereof, the vessel, her owner, operator, demise charterer, time charterer, voyage charterer, space or slot charterer, subcarrier and substitute carrier, whether acting as carrier or bailee." JA 59.

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[1] This explains why respondents (as they concede) made no effort in the district court to ascertain whether Hamburg Süd used the common slot-charter arrangement to carry these goods. Resp. Br. 3 n.2.

[2] 46 U.S.C. app. § 1301(a) ("The term 'carrier' includes the owner *or the charterer* who enters into a contract of carriage with a shipper") (emphasis added); M. Reilly, *Identity of the Carrier: Issues Under Slot Charters*, 25 Tul. Mar. L.J. 505, 510 (2001) ("traditional analysis" treats "each Slot Charterer [as] a COGSA carrier with respect to its own cargo"); 46 U.S.C. app. § 1702(16) (defining "ocean common carrier").

The sole issue presented in Question 1 is whether the ocean carrier bill of lading issued by Hamburg Süd is enforceable against the cargo owner. This is the single through bill of lading for door-to-door transportation pursuant to the Shipping Act, see Pet. 3-4, under which the ocean and inland carriers transported Kirby's goods. "Norfolk Southern did not issue its own bill of lading, but instead acted under the Hamburg Süd bill." Pet. App. 4a. The Hamburg Süd bill by its terms indisputably extends the COGSA liability limitations to NS as a participating carrier (as the Eleventh Circuit acknowledged). Pet. Br. 11, 22-23. Accordingly, the issue to be decided by this Court is the enforceability of Hamburg Süd's bill, and its method of carrying the goods on the ocean leg of the journey has no bearing on that question.

Respondents' second attempt at obfuscation is to raise belatedly issues of fact regarding NS's rules circular, boldly ignoring the record and relying upon "discovery materials produced by NS, and correspondence that would be available in discovery." Resp. Br. 2. This argument is both waived and irrelevant. In the district court, respondents raised the alternative defense to summary judgment that, if any contractual limitation of liability applied to NS, it was the limit of the circular, Pet. App. 32a, but made no showing creating a genuine issue of fact that the circular negated the limitations extended to NS by the Hamburg Süd bill of lading. The district court ruled that the Hamburg Süd bill was a through bill of lading "which the defendant contracted and performed under" and which "unambiguously" protected NS. *Id.* at 37a. Rather than challenge that holding on appeal, respondents abandoned any reliance on the circular. They stated that "[t]he Hamburg Süd bill of lading may have been the 'one which [NS] contracted and performed under,' as the district court suggested," Resp. CA Br. 24, and relied solely on the argument that the Hamburg Süd bill did not bind Kirby. The Eleventh Circuit resolved the case on that basis. Pet. App. 4a, 6a-11a. The effect of the rules circular is thus

not before this Court. Regardless, respondents' arguments are irrelevant because the circular does not displace the Himalaya clause of the ocean carrier's bill of lading. *Canon USA, Inc.* v. *Norfolk S. Ry.*, 936 F. Supp. 968, 974 (N.D. Ga. 1996).[3]

It is clear why respondents wish to divert the Court's attention from the question presented: if the vessel carrier's contract of carriage in its bill of lading cannot be enforced against the cargo owner, then COGSA itself is nullified. Pet. Br. 36-37. Respondents rejoin that the applicability of COGSA does not turn on the carrier's bill of lading, making the astonishing claim that "COGSA applies of its own force *for the ocean carriage* to the United States, so the liability limits in Hamburg Süd's bill are irrelevant in determining the ocean carrier's actual liability if the loss occurs at sea and thus falls within COGSA's scope." Resp. Br. 29 (emphasis added). That is misleading; COGSA only applies to "*contracts for carriage* by sea of goods to or from ports of the United States" manifest in bills of lading. 46 U.S.C. app. § 1312 (emphasis added); *see also id.* §§ 1300, 1302. COGSA only "regulates the terms of ocean carriage by the indirect but highly efficacious device" of imposing statutory mandates as "compulsory terms" in the ocean carrier's bill of lading. G. Gilmore & C. Black, Jr., *The Law of Admiralty* § 3-25, at 145, § 3-38, at 172 (2d ed. 1975); 1 T. Schoenbaum, *Admiralty and Maritime Law* § 10-15, at 650 (4th ed. 2004). Respondent's counsel has elsewhere acknowledged this. Sturley, *Overview*, at 282-83; *see also id.*

[3] The circular is instead part of the carrier-to-carrier subcontract with Hamburg Süd that caps Norfolk Southern's total indemnity in circumstances where the per-package COGSA limits extended by a bill of lading are inadequate (such as containers holding hundreds of small, valuable packages, like cameras or gyroscopes), or where the shipper can prove the inapplicability of the COGSA limits (such as lack of fair notice). *Cf.* M. Sturley, *An Overview of the Considerations Involved In Handling The Cargo Case*, 21 Tul. Mar. L.J. 263, 329-32, 340-47 (1997) ("Sturley, *Overview*") (discussing those defenses to COGSA limitations).

at 347-48 (noting that COGSA authorizes carriers to set liability limits above the statutory floor in bills of lading).

Thus, if the vessel carrier's contract of carriage cannot be enforced against the cargo owner, then the *mandatory* statutory COGSA limitations on carrier liability cannot be enforced against the cargo owner who uses a forwarder-carrier, even as to losses at sea. World Shipping Council ("WSC") Br. 5-6 & n.7. Moreover, even respondents do not contest that their position would nullify the statutory provision empowering vessel carriers to extend the mandatory COGSA limitations beyond the tackle-to-tackle period by contract, 46 U.S.C. app. § 1307, thus frustrating the national policy by which Congress encourages carriers to "place all of their dealings under COGSA, if they so intend." *Wemhoener Pressen* v. *Ceres Marine Terminals, Inc.*, 5 F.3d 734, 741 (4th Cir. 1993). And, it is precisely because COGSA would be wholly nullified, both as to its mandatory and its permissive provisions, that a federal rule regarding the enforceability of carrier contracts of carriage is compelled. *See id.*; Gilmore & Black, *supra* §§ 3-19 & 3-20, at 130, 133 (carrier liability under foreign bills of lading determined by federal law); D. Robertson et al., *Admiralty And Maritime Law In the United States* 326 (2001); *American Dredging Co.* v. *Miller*, 510 U.S. 443, 447 (1994). The federal rule compelled by COGSA is the very rule that is established by 150 years of this Court's common carrier precedents, and that is also compelled by the Shipping Act's mandate that nonvessel carriers like ICC are "shippers" in their dealings with vessel carriers: namely, that the cargo owner is bound by the contracts that the forwarder-carrier makes with the vessel carrier to transport the owner's goods. Pet. Br. 22-39.[4]

[4] Respondents' puzzling argument that the enforceability of an international maritime bill of lading is governed by state law under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), Resp. Br. 24-25, was not raised in their opposition, and (just like its now abandoned argument in its supplemental brief that foreign law applies) is waived. *Baldwin v. Reese*, 124 S. Ct. 1347, 1352 (2004); Pet. Supp. Br. 4-5. The *Erie* argument is

2. Respondents' accusation that NS has "fabricated" this federal rule, Resp. Br. 19, is heavy with irony, given that the initial brief cites a wealth of carrier cases and treatises recognizing this rule, Pet. Br. 32-36, and respondents cannot muster one that adopts their position. Respondents instead strain to distinguish all of this Court's common carrier cases as involving not forwarder-carriers like ICC, but "a forwarder acting in its classic role as the cargo owner's agent." Resp. Br. 7. Their distinctions are untenable, and their invocation of general Restatement principles of agency disregard the specialized rules that have developed in response to the practical necessities of common carriage.

Respondents try to distinguish *New Jersey Steam Navigation Co. v. Merchant's Bank*, 47 U.S. (6 How.) 344 (1848), on the ground that the party (Harnden) that contracted with the vessel carrier was the bank's agent. Resp. Br. 16. Respondents fail to address the part of this Court's opinion explaining why that is so. The parties had disputed whether Harnden was an ordinary agent for the bank, or a nonvessel carrier contracting with the vessel carrier. Pet. Br. 23. This Court held that it did not matter. Even if Harnden had contracted as a carrier with the banks, nonetheless in contracting with the vessel carrier he was "*considered in law the agent or servant of the owner*, and the possession of the agent is the possession of the owner." 47 U.S. at 380 (emphasis added). Thus, Harnden's contract with the vessel carrier was "in contemplation of law" a contract between the vessel owner and the cargo owner. A nonvessel carrier's contract with the vessel carrier binds the cargo owner.

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baseless in any event; it is premised on the flawed claim that neither COGSA nor the Shipping Act applies to the ICC-Hamburg Süd contract of carriage, and disregards that an ocean bill of lading is a maritime contract subject to maritime law. 1 Schoenbaum, *supra* § 10-11, at 622; *see also Cincinnati, New Orleans, & Tex. Pac. Ry.* v. *Rankin*, 241 U.S. 319, 326-27 (1916) (interstate bills of lading are governed by federal law).

The Court mandated a similar rule in *Great Northern Railway* v. *O'Connor*, 232 U.S. 508 (1914). Pet. Br. 27-29. Respondents claim that the cargo owner in that case (O'Connor) had "stress[ed] that the forwarder *was* her agent" in her brief to this Court. Resp. Br. 20-21 (citing O'Connor Br. at 4-5, No. 996 (Oct. Term 1912)). It is hard to fathom how respondents can make that representation. O'Connor's brief never says that. Instead, on those very pages, O'Connor invokes a case in which the Utah Supreme Court had held that a cargo owner was not bound by a contract of carriage that a drayman had executed with the railroad, because the relation between the cargo owner and the drayman "'was that of shipper and carrier rather than that of principal and agent.'" O'Connor Br. at 4-5 (quoting *Benson* v. *Oregon Short Line R.R.*, 99 P. 1072, 1074-75 (Utah 1909)). O'Connor argued that *Benson* was "good law" governing her case, and thus there was "no valid contract between [the parties] releasing the value of the goods in question." *Id.* at 5, 7. Thus, O'Connor's lead argument to the Court was the very one that respondents advance now.

This Court rejected that argument and held the cargo owner bound to the liability limitations to which the forwarder agreed. The Court noted that Boyd was "a forwarder, engaged in collecting a number of small shipments from various persons in order to fill a car and obtain the lower rates applicable to carload shipments." 232 U.S. at 514; cf. Pet. Br. 25-26 (discussing forwarder-carriers under the Interstate Commerce Act). Nonetheless, under longstanding precedent, such a forwarder was a "shipper" in contracting with the rail carrier. 232 U.S. at 514. As a shipper, the forwarder bound the cargo owner to the carrier's terms even if it acted against the owner's instructions:

> [T]he Transfer Company had been entrusted with goods to be shipped by railway, and, nothing to the contrary appearing, the carrier had the right to assume that the Transfer Company could agree upon the terms of the

> shipment . . . . The carrier was not bound by her private instructions or limitation on the authority of the Transfer Company, whether it be treated as agent or Forwarder.

Id. A forwarder is a shipper in dealing with the transportation carrier, and its contracts bind the owner who entrusted the forwarder with its goods.

Respondents likewise cannot distinguish *Chicago, Milwaukee, St. Paul & Pacific Railroad* v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 484 (1949). The surface freight forwarders at issue in *Acme* are identical to nonvessel forwarder-carriers like ICC: they issue their own bills of lading, contractually assume the liability of a carrier from origin to destination, select the transportation carriers, and contract with those carriers in their own names and for their own profit. *Id.* at 478-80, 484-85. As such they are distinct from a traditional "agent-forwarder." *Id.* at 484. Forwarder-carriers have a "duality of character." *Id.* at 468. Even though in "their relations with shippers, forwarders unquestionably perform functions and have duties similar to the functions and duties of common carriers," nonetheless they "occupy a different position in their dealings with the carriers whose services they utilize." *Id.* at 477-78. They are "shippers *vis-à-vis* carriers." *Id.* at 479. Because the cargo owner entrusts its goods to the forwarder to ship with the rail carrier, the owner "is the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier." *Id.* at 488 n.27 (citing *New Jersey Steam* and *Great N. Ry.*). This is not a rule "for purposes of establishing when the forwarder may bring a subrogation action against the rail carrier for damage to the goods," Resp. Br. 22, for indeed forwarders are not subrogees, 336 U.S. at 488 n.27. Rather, this Court's precedent establishes that forwarders are shippers in contracting with the carrier for service, not just for damages actions. *Great N.*, 232 U.S. at 514. *Great Northern* and *Acme* are fatal to respondents' position.

Finally, respondents fail to reconcile their stance with the rule that "the bill of lading is a contract between the transportation company and him who is interested in the shipment." *Michigan Cent. R.R.* v. *Mark Owen & Co.*, 256 U.S. 427, 430 (1921). They answer that the endorsement of a negotiable bill of lading transfers contract rights to an endorsee, Resp. Br. 23 n.21, but that doctrine does not explain *Mark Owen*. Rail bills of lading are almost always straight, not negotiable, bills. Stephen G. Wood, *Multimodal Transportation: An American Perspective on Carrier Liability and Bill of Lading, in Multimodal Transport* 236, 264 (A. Kiantou-Pampouki ed. 2000) ("Kiantou-Pampouki"). *Mark Owen* and the other cases cited (Pet. Br. 30) turn on a separate common carrier doctrine (applicable to rail and sea bills alike): namely, that the consignor is deemed the "agent" of the consignee who owns the goods. R. DeWit, *Multimodal Transport* § 5.2 (1995). "It is presumed that the contract is made between the carrier and the owner of the goods, and it does not matter who actually has paid or has agreed to pay the freight." *Id.*; 1 Schoenbaum, *supra* § 10-10, at 6-18; A. Dobie, *Handbook on the Law of Bailments and Carriers* § 154, at 497 (1914). Indeed, the $500-per package limitation adopted in COGSA is predicated on the understanding that the owner-consignee is bound even if he was not the shipper. See 1 *The Legislative History of the Carriage of Goods By Sea Act and the Travaux Preparatoires of the Hague Rules* 302 (M. Sturley ed. 1990). [5]

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[5] The common law has long recognized that a cargo owner who authorized shipment was bound by the ocean carrier's contract of carriage even where he was not a party to the contract. Pet. Br. 31. Respondents claim (Br. 46-47) that the 13th edition of Carver's treatise shows the rule petitioner cited to have been superseded by the recognition of tort actions against carriers. That is false. The same page they cite verifies the common law rule that "[w]here . . . goods have been shipped with the consent of the owner, though not under contract with him, he will not be in a position to claim against the shipowner *for the consequences of a tortious act*, if the shipowner is exempted from liability for such acts by

Agency in common carrier law thus does not depend upon conformity with Restatement criteria, such as fiduciary duty, disclosure of profits, or right of control. Agency is attributed based upon the exigencies of common carriage. The carrier often does not deal with the owner (the real party in interest), and cannot inquire into title, Pet. Br. 27 n.6, and the contractual terms on which it agrees to transport the goods are illusory if the owner is not bound.

Similarly, in the common law of connecting carriage (which would not apply to forwarders, who are shippers, *Acme*, 336 U.S. at 478-80 & n.17), an initial carrier who accepted payment for the entire journey but did not issue a through bill of lading beyond its lines was deemed the "agent" of the shipper in contracting with a connecting carrier. *Atlantic Coast Line R.R.* v. *Riverside Mills*, 219 U.S. 186, 195 (1911) (discussing law prior to the Carmack Amendment). Agency there also had nothing to do with Restatement factors; the carriers were not controlled by the owner, obligated to disclose profits from connecting carriage, or fiduciaries in any sense different from a forwarder-carrier.

The Restatement "restates" general agency principles; it does not purport to restate specialized carrier law, much less to abrogate rules of carrier law established or recognized by

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the contract with the shipper." 1 R. Colvinaux, *Carver's Carriage By Sea* § 121 (13th ed. 1982) (emphasis added). The seminal case is *DeLaurier & Co.* v. *Wyllie*, in which Lord Kyllachy, joined by a majority of justices on this point, held that a charter party limiting liability would be enforced against the owner regardless of whether the shipper of the iron were an agent or principal, for "so far as [the owners'] claim is rested on their property in the iron and the defendant's negligence," the defendants "had no notice that the iron was not the property of the shippers, who were in possession of the iron." 17 Scot. L. Rep. 148, 163 (1889). "[I]f he (the owner) chooses, instead of shipping the goods himself, to entrust them to the charterers, and then allows them (the charterers) to ship them in their own name, his title to the goods is and must be qualified, by the contract of affreightment which the charterers have lawfully made." *Id.* at 164; *accord id.* at 158-59 (Shand, J.).

this Court. Carrier law deems as "agency" what in Restatement terms may be the investiture of a "power" to bind the owner to the carrier's contract. See *Restatement (Second) of Agency* §§ 1 cmt. g, 6 (1958). The result is the same. An owner's entrustment of goods to another to deliver to a carrier constitutes authority to bind the owner to the carrier's terms. 14 Am. Jur. 2d *Carriers* § 558 (2000). This principle binds Kirby to the ICC/Hamburg-Süd contract.[6]

3. The Shipping Act lays the issue to rest. A nonvessel-operating common carrier (NVOCC) is expressly defined by the 1984 Shipping Act to be "a shipper in its relationship with an ocean common carrier." 46 U.S.C. app. § 1702(17)(B). When Congress uses a term like "shipper" with established legal meaning in a statute, it is presumed to intend that meaning. *INS* v. *St. Cyr*, 533 U.S. 289, 312 n.35 (2001). Under *Great Northern* and the FMC rules that preceded the 1984 Act, a forwarder that assumed carrier liability towards its customers was still a shipper (and thus agent of the actual shipper) in transacting with the transporting carriers. Pet. Br. 32-34. Kirby does not dispute that ICC is an NVOCC. See Resp. Br. 11; D. Robertson & M. Sturley, *Recent Developments In Admiralty and Maritime Law at the National*

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[6] *York Co. v. Central R.R.*, 70 U.S. (3 Wall.) 107 (1865), does not involve a forwarder-carrier, but it refutes respondents' claim that the enforcement of a carrier's contract against the owner is resolved by general agency principles. York claimed that Trout & Sons was "a special agent of the plaintiff only for the purchase and shipment of cotton," authorized only to place the goods with the railroad as a common carrier with duties of an insurer fixed by law. No. 107, Abstract of Record 4. York contended it was entitled to a jury trial on whether Trout & Sons exceeded its authority in negotiating what was then a "special and unusual contract" reducing the railroad's liability (which, if proven, would invalidate the contract under agency principles). York argued that "authority ... may be implied, but not from the mere possession of goods with the authority to ship." *Id.* at 14. This Court disagreed. The railroad was entitled to rely upon the terms of its contract of carriage, for "[s]o far as the defendant could see, [Trout & Sons] were themselves the owners." 70 U.S. at 113.

Level and in the Fifth and Eleventh Circuits, 27 Tul. Mar. L.J. 495, 565, 567 & n.671 (2003) (discussing "treatment of the status of NVOCC's" by Eleventh Circuit and remarking that "ICC Ltd. was at least a non-vessel-operating carrier"); Ramberg Br. 10 (a freight forwarder issuing an FBL is an NVOCC); U.S. Br. 28. Thus, Kirby is bound by ICC's contract with Hamburg Süd.

Not only does the very definition of an NVOCC under the Shipping Act compel this result, but any other outcome would frustrate the Shipping Act. Respondents wrongly insist that ocean shipping was deregulated both at the time of the shipment and now. Resp. Br. 29. That was not true in 1997 (when ICC contracted with Hamburg Süd), and it is not true today. In 1997, Hamburg Süd was obligated to "file with the [Federal Maritime] Commission . . . tariffs showing all its rates, charges, classifications, rules, and practices" for through inland transportation, including its bill of lading or other document manifesting the transportation agreement. 46 U.S.C. app. § 1707(a) (1994); JA 60 ¶ 2. Carriers could not provide service that deviated from the tariff, nor could they discriminate against any shipper, including NVOCCs. 46 U.S.C. app. § 1709(b) (1994); Pet. Br. 34-35; U.S. Br. 24-25. It would violate the Act for one shipper to receive tariffed service where the liability of the vessel carrier and connecting inland carriers to the owner was defined by the COGSA limits in the tariffed bill of lading, and for the NVOCC to purchase the same tariffed service without any such limitation. See 46 U.S.C. app. § 1709(b)(1), (4), (6), (10), (11) (1994); Pet. Br. 35. The structure of the Shipping Act thus confirms that a forwarder-carrier like ICC is a shipper whose contracts of carriage bind the owner.[7]

[7] The Government conceives of *Great Northern* as a preemption decision, and urges the Court to decide the case on this basis. U.S. Br. 20-26. Respondents counterargument that preemption "rests on the weakest of foundations," Resp. Br. 28, is ill-considered; the filed rate doctrine is a preemption doctrine that precludes assertion of state (or foreign) law rights in contravention of the tariff. *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 226-28 (1998). Thus, this Court may invoke preemption if it were to assume that respondents could assert a nonfederal right of action in disregard of the contract of carriage. But it would be artificial to assume such a right, when federal law dictates a contrary rule under both COGSA and the Shipping Act. *Great Northern* was predicated on the status of forwarders as shippers under federal law, and on the carrier's entitlement to rely upon the owner's entrustment of its goods to the forwarder as authority to accept the carrier's terms. 232 U.S. at 514.

Under the Ocean Shipping Reform Act of 1998, tariffs are still mandatory although publication occurs by accessible electronic databases, not filing with the FMC, and the statute still proscribes departure from tariffs and specified discrimination. The filed rate doctrine still applies. WSC Br. 10, 16-17; U.S. Br. 24-25; 1 Schoenbaum, *supra* § 10-2, at 575-78.

4. Notwithstanding the clarity of federal law, and the commands of COGSA and the Shipping Act, respondents claim that this Court should align federal law with supposed international norms. This argument lacks force. First, Congress has always steered its own course: "the United States today has a law governing the carriage of goods by sea that is different on its face from the laws of most of our major trading partners and different in application from the law of any country anywhere." M. Sturley, *The Proposed Amendments to the Carriage of Goods by Sea Act: An Update*, 13 U.S.F. Mar. L.J. 1, 3-4 (2001). Indeed, the U.S. is almost alone in asserting preemptive jurisdiction over contracts of carriage for trade *into* the country, precisely so that federal law will prevail. Sturley, *Overview*, at 283.

Second, there is no "uniformity now prevailing in all of the major maritime trading nations." Resp. Br. 30. In respondent's counsel's words, there is only a "confused international situation" with a "breakdown in uniformity of the law governing an ocean carrier's liability for cargo loss or damage." M. Sturley, *The United Nations Commission on International Trade Law's Transport Law Project: An Interim View of a Work in Progress*, 39 Tex. Int'l L.J. 65, 68 (2003). Parties to an overseas contract of carriage can only know their rights by familiarizing themselves with the *national* law that

governs the transaction. The laws in the various civil-law and common-law nations are a crazy quilt of different conventions, mandatory national laws, and rules concerning the legal status of forwarder-carriers, actions in tort versus contract, the right of an owner to sue a connecting carrier or subcontractor, and defenses of the latter under the principal contract of carriage. DeWit, *supra* § 15.1 (noting that "the fundamentally different positions which exist in various legal systems regarding this matter would appear to" frustrate efforts at a uniform approach); see generally *id.* §§ 1.1-3.4, 14.1-16.19; Kiantou-Pampouki, at 63, 69-268.

The international law professors supporting respondents skirt this problem by analyzing only the subsidiary question of whether certain countries would regard a forwarder-carrier as an agent. They are careful not to suggest, however, that such nations would subject a carrier to unlimited liability for damage to goods in disregard of the contract of carriage simply because the cargo owner used a freight forwarder. The British commonwealth nations are a case in point. American law apparently diverges from British law in treating forwarder-carriers as shippers, and not carriers, in their dealings with other carriers. H. Bennett, *The Commission and the Common Law* 71-72 (1964). British courts nonetheless reach the same result as petitioner urges on the theory of "sub-bailment on terms," whereby the cargo owner engaging a forwarder-carrier to procure transportation from vessel carriers consents (impliedly or expressly) to the vessel carrier's terms of carriage. This doctrine permits a sub-bailee (the vessel carrier) to assert the terms of its contract with the bailee (the forwarder-carrier) in a suit against it by the bailor (the cargo owner) for loss or damage to the goods, even though the owner is not a party to the sub-bailment contract.[8]

[8] DeWit, *supra* § 14.40 (citing British and Canadian cases, and noting similar results under Dutch law); M. Davies, *The Elusive Carrier: Whom Do I Sue and How*, 1991 Aus. Bus. L. Rev. 230, 235 (under this doctrine, "a sub-contracting sea-carrier may rely on the terms of its contract with the forwarder-carrier in an action brought by the shipper or consignee of the goods"); *Sonicare Int'l, Ltd. v. East Anglia Freight Terminal Ltd.* [1997] 2 Lloyd's Rep. 48, 53-54 (finding implied consent to vessel carrier's terms that were more onerous than the freight forwarder's terms).

Respondents err in claiming that "nowhere else in the world would [the Hamburg Süd bill of lading] be held binding on Kirby." Resp. Br. 27. No international norm confers the windfall respondents seek.

5. Petitioner's brief sets out the policy ramifications of abandoning longstanding federal law. Pet. Br. 36-39. The United States and the World Shipping Council confirm that such a change would severely disrupt existing commercial practice. U.S. Br. 23-24; WSC Br. 3-6, 16-18.

Respondents' policy-based arguments cannot overcome federal law, but are in any event meritless. Respondents wish to make this into a case about the railroad's reliance or the fairness of limiting the NS's liability to "a ridiculously low limitation" of $500 per package. Resp. Br. 24. But these misguided complaints are directed at the COGSA per-package limitations (which their counsel has elsewhere defended, M. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5) (Part II)*, 19 J. Mar. L. & Com. 157, 201-03 (1988)), and the policy of COGSA and the Shipping Act to authorize the ocean carrier to extend COGSA limits to inland carriers in through bills of lading. Pet. Br. 3-9. In this vein, respondents' repeated invocation of a "network liability" legal regime, where special rules should allegedly apply to railroads, is of no moment. No mandatory liability regime governs rail carriage; the Hamburg Süd bill did not adopt network liability principles; and given the Shipping Act's requirement of through rates for door-to-door ocean transport, any attempt by a carrier to adopt "the 'network liability scheme' is legally in doubt.'" 1 Schoenbaum, *supra* § 10-4, at 600. Hamburg Süd indisputably extended the COGSA limits to NS, as it had the legal right to do. The only issue is whether the Hamburg Süd bill can be enforced.

Not only can respondents offer no authority that would render the vessel carrier's bill unenforceable, but they offer no sound policy why the rights and duties of the carriers who transport and handle the goods should be defined not by their own standard contracts on which all carriers and service providers rely, but instead on a middleman's contract. That contract is wholly unknown to them (and may not even protect them, depending on the fortuity of whether a given forwarder-carrier has included an adequately worded Himalaya Clause). See *Acme*, 336 U.S. at 480 ("The underlying carrier's haul involves a different shipment, a different consideration, a different origin, a different destination, and a different consignor and consignee than are involved in the forwarder's undertaking."); WSC Br. 11.

Finally, respondents claim unfairness to the cargo owner, even though the owner (having insured the goods) declined to declare value in order to secure a lower rate from the forwarder, which thereby cannot declare value and must accept the vessel carrier's liability limits. Pet. Br. 39. First, respondents complain that extending COGSA to the railroad violates the public policy against exculpating a carrier from its negligence. They confuse apples and oranges; as this Court long ago held, liability limits accepted in return for lower rates are a form of liquidated damages and do not implicate the policy against exculpation from negligence. *Hart v. Pennsylvania R.R.*, 112 U.S. 331, 337-41 (1884). Second, respondents complain about the owner's risk of liability for a second freight charge if the forwarder defaults; but the vessel carrier has a lien against the owner's goods regardless, and respondents would have their remedy against the forwarder. Third, respondents complain that they might be liable for the negligence of the forwarder in shipping hazardous goods, Resp. Br. 31, but the doctrine that owners are bound by the contract of carriage has not been so extended. Even if it were, there would be no injustice; far better the loss should fall on the owner who entrusted

hazardous goods to a negligent forwarder than upon the innocent carrier. Last, whether the owner had knowledge of the vessel carrier's terms (see Resp. Br. 30, 49) is legally irrelevant under *Great Northern* and the filed rate doctrine, *Kansas City S. Ry.* v. *Carl*, 227 U.S. 639, 652 (1913). If this were a concern, Kirby should have either dealt with the vessel carrier itself, or required ICC to select only approved carriers. Having granted ICC unqualified authority to procure transportation from a vessel carrier, it cannot complain now.

6. Even if the Hamburg Süd bill is unenforceable, NS is entitled to the liability limitations in ICC's contract with Kirby. Pet. Br. 40-49. Respondents would convert *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959), into a rule of contract nullification, arrogating to courts the power to override the contractual language to which the parties agreed and to determine when such language is "permissible." Resp. Br. 38 n.38. Nothing in *Herd* or any other case of this Court supports their position.

Respondents are unabashed in their claim that a court may disregard the plain contract language. They repudiate the rule that "[t]he principle of strict construction" does not permit courts to deny text its "natural significance," *Singer* v. *United States*, 323 U.S. 338, 341-42 (1945), as applicable only to criminal statutes. Resp. Br. 34. To the contrary, this Court has always emphasized that the rule of strict construction in *contracts* likewise applies only to resolve ambiguities, and does not empower courts to ignore "the sense and meaning of the terms which the parties have used," which, absent ambiguity, "are to be taken and understood in their plain, ordinary, and popular sense." *Imperial Fire Ins. Co.* v. *Coos County*, 151 U.S. 452, 463 (1894). More specifically, this Court has long held that clauses limiting liability in bills of lading must be given their "fair and reasonable meaning," with resort to strict construction necessary only if the clause is ambiguous. *Texas & Pac. Ry.* v. *Reiss*, 183 U.S. 621, 626,

629 (1902). This is the rule followed in *Herd*. Pet. Br. 41-42.[9]

Respondents make no argument regarding the plain language of the ICC Himalaya clause. That clause extends the bill's liability limits not only to the carrier's servants and

[9] Respondents evince a misunderstanding of *Herd* in arguing that Norfolk Southern improperly "transformed" the question presented of maritime law into one of "contract interpretation." Resp. Br. 37 n.36. There is no transformation; *Herd* is a federal maritime rule of contract interpretation (no different from the common law rule), 359 U.S. at 305, but one that can only be invoked to resolve contractual ambiguities, not to override the contract. Moreover, the reference in the petition's question presented to whether "federal maritime law requires" a privity rule simply reflects the Eleventh Circuit's holding that "[i]n this Circuit . . . the law requires privity between the carrier and the party seeking shelter in the Himalaya clause." Pet. App. 13a-14a. Respondent's further claim that the "any other person" language in the ICC Himalaya Clause was not raised in the petition and is not before this Court, Br. 37-38, is a flat misstatement. The petition expressly argued that "[t]he plain language of the FBL refutes the Eleventh Circuit's implausible construction of the Himalaya clause, and underscores the impropriety of its privity-of-contract rule. First, the Himalaya clause in Clause 10.1 of the ICC bill by its terms extends liability to 'any servant, agent *or other person (including any independent contractor) whose services have been used in order to perform the contract*.' Pet. App. 59a (ICC ¶ 10.1)." Pet. 27 (emphasis in the petition). Not only was this point argued, but plain contract meaning is "fairly included" within and "predicate to an intelligent resolution of" the question presented regarding the *Herd* rule of contract construction. Sup. Ct. R. 14.1; *Vance* v. *Terrazas*, 444 U.S. 252, 258-59 n. 5 (1980).

Respondents also renew their (meritless) argument that the Eleventh Circuit's declaration that *Herd* requires express references to "inland carriers" in Himalaya clauses is outside the question presented and precludes review of that question as an independent basis for the judgment. Resp. Br. 42 That same contention was raised in the opposition (Opp. 24-25) and refuted in the reply brief (Pet. Reply 9 & n.7). Because the argument was raised in the opposition, "[i]n granting certiorari, [this Court] necessarily considered and rejected that contention as a basis for denying review." *United States* v. *Williams*, 504 U.S. 36, 40 (1992). In all events, the Eleventh Circuit's misguided "inland carrier" rule only has conceivable relevance to this case if *Herd* permits a court to nullify the contractual language used by the parties, which it does not.

agents, but to "*any* . . . other person (including *any* independent contractor) whose services have been used in order to perform the contract." JA 94 (¶ 10.1) (emphasis added). Respondents do not deny that NS, which carried the goods inland to Huntsville, is a person "whose services have been used in order to perform the contract" for multimodal transportation both by sea and land of the goods to Huntsville. Pet. Br. 43. Indeed, respondents attempt no construction – strict or otherwise – of this contractual language. Like the Eleventh Circuit, respondents claim that this language must be nullified (not strictly construed) because allegedly it lacks "clarity." Resp. Br. 35-36. But no court may "rewrite [the parties'] contract while purporting to interpret or construe it." 11 R. Lord, *Williston on Contracts* § 31:5, at 299 (4th ed. 1999). The Eleventh Circuit had no writ to expunge this language to "leave[], then, a Himalaya clause that extends to 'any servant, agent, or . . . any independent contractors.'" Pet. App. 12a. Courts applying strict construction rules "may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made." *Imperial Fire Ins. Co.*, 151 U.S. at 462.

The Eleventh Circuit's interpretation also cannot be squared with the rule that a contract is read as a whole. *Williston*, § 32:5. "[W]hen the same word or phrase is used in different parts of the contract, it will be presumed to be used in the same sense throughout; and where its meaning in one instance is clear, that meaning will be attached to it elsewhere in the contract." *Schweigert* v. *Beneficial Standard Life Ins. Co.*, 282 P.2d 621, 626 (Or. 1955). The initial brief demonstrated that the Eleventh Circuit's interpretation of Clause 10.1 must be rejected because Clause 2.2 uses substantively identical language in defining the *freight forwarder's* liability, and under that construction ICC would have succeeded in immunizing itself *totally* for liability for loss for part or all of the door-to-door multimodal contract of carriage (depending on whether its "independent contractor in

privity" Hamburg Süd chartered or subcontracted the ocean as well as the inland transport). Pet. Br. 44-45; U.S. Br. 14-16. Unable to bless this result, respondents tie themselves in knots with warring canons of construction. They advance the absurdity that the same contract language addressing liability will be broadly construed in one clause (2.2) to include railroads and every other service performer, marine or inland, but strictly construed in a neighboring clause (10.1) to mean only the initial vessel carrier with whom the forwarder directly contracts. Resp. Br. 34-35. But their concession that Clause 2.2 covers inland carriers concedes the case. Clause 10.4 of the ICC bill states that "[t]he aggregate of the amounts recoverable from the Freight Forwarder *and the persons referred to in Clauses 2.2 and 10.1* shall not exceed the limits provided for in these conditions." JA 94 (emphasis added).[10]

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

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[10] Even respondents' arguments that treat the ICC Himalaya Clause *as if* it only spoke of independent contractors are unsound. Drawing on cases involving ocean carriers' *ocean* bills of lading, they have no answer to the argument that a rule requiring privity and excluding inland carriers is nonsensical as applied to a multimodal, inland forwarder bill. Pet. Br. 48-49; U.S. Br. 14-19. Courts find Himalaya clauses to cover inland carriers even when not expressly designated therein. *See Caterpillar, Inc.* v. *Columbus Line, Inc.*, 19 F.3d 26 (9th Cir. 1994) (table), *available at* 1994 WL 59763, at **2; *Taisho Marine & Fire Ins. Co.* v. *Maersk Line, Inc.*, 796 F. Supp. 336, 342 (N.D. Ill. 1992), *aff'd*, 7 F.3d 238 (7th Cir. 1993) (table); *Aisin Seiki Co.* v. *Union Pac. R.R.*, 236 F. Supp. 2d 343, 347-48 (S.D.N.Y. 2002). Other courts reasonably compare the services the contractor performs to those the issuer undertakes. *Akiyama Corp. of Am.* v. *M.V. Hanjin Marseilles*, 162 F.3d 571, 574 (9th Cir. 1998). Moreover, respondents ironically contend that the term "'[i]ndependent contractors' covers only maritime parties such as stevedores and terminal operators," Resp. Br. 42, even though the rule they favor excludes such parties. Pet. Br. 46-47 & n.16. Finally, respondents err in invoking canons relevant to exculpatory clauses, Br. 34, which do not apply to rate-based liability limitations. *See infra* at 16.

Respectfully submitted,

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